

Before the  
Administrative Hearing Commission  
State of Missouri



DIRECTOR OF THE DEPARTMENT  
OF INSURANCE, FINANCIAL  
INSTITUTIONS AND PROFESSIONAL  
REGISTRATION,

Petitioner,

vs.

LEE EDWARD DELEARY,

Respondent.

No. 14-0170 DI

**DECISION**

We grant the Director of the Department of Insurance, Financial Institutions and Professional Registration's (respectively, the "Director" and the "Department") motion for summary decision, and find Lee Edward DeLeary is subject to discipline because he misappropriated money in the course of doing insurance business; used fraudulent and dishonest practices and was incompetent, untrustworthy, and financially irresponsible in the conduct of his business; and he failed to respond to an inquiry from the Department's Consumer Affairs Division.

**Procedure**

On January 31, 2014, the Director filed a complaint seeking to discipline DeLeary. On February 10, 2014, we served DeLeary with a copy of the complaint and our notice of

complaint/notice of hearing by certified mail. DeLeary did not file an answer or other responsive pleading, as required by 1 CSR 15-3.380(1).<sup>1</sup>

On March 24, 2014, the Director filed a certificate of service certifying that Petitioner's First Requests for Admissions, Interrogatories, and Request for Production of Documents were served on DeLeary by U.S. Mail, postage prepaid, on that same date.

On July 2, 2014, the Director filed a motion for summary decision ("the motion"). Our Regulation 1 CSR 15-3.446(6) provides that we may decide this case without a hearing if the Director establishes facts that DeLeary does not dispute and entitle the Director to a favorable decision.

In the motion, the Director argues that DeLeary did not respond to his discovery. Under Supreme Court Rule 59.01, the failure to answer a request for admissions establishes the matters asserted in the request, and no further proof is required.<sup>2</sup> Such a deemed admission can establish any fact or any application of law to fact.<sup>3</sup> Section 536.073<sup>4</sup> and our Regulation 1 CSR 15-3.420(1) apply that rule to this case. Moreover, because DeLeary failed to answer or otherwise respond to the complaint, we order that he is also deemed to have admitted the facts pleaded and defaulted on any issue raised in the complaint.<sup>5</sup>

The following facts are not disputed.

### **Findings of Fact**

1. The Department issued an insurance producer license to DeLeary on September 20, 2010. His license expired on September 20, 2012.

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<sup>1</sup> All references to the CSR are to the Missouri Code of State Regulations as current with amendments included in the Missouri Register through the most recent update.

<sup>2</sup> *Killian Constr. Co. v. Tri-City Constr. Co.*, 693 S.W.2d 819, 827 (Mo. App., W.D. 1985).

<sup>3</sup> *Linde v. Kilbourne*, 543 S.W.2d 543, 545-46 (Mo. App., W.D. 1976).

<sup>4</sup> RSMo 2000. Statutory references, unless otherwise noted, are to the 2013 Supplement to the Revised Statutes of Missouri.

<sup>5</sup> 1 CSR 15-3.380(7).

2. In November 2012, the Department's Consumer Affairs Division (the "Division") received a complaint from Caralee Richterkessing against DeLeary alleging that DeLeary had misappropriated her premium. Richterkessing complained that in July 2011, she had given DeLeary a \$5,200 check payable to John Hancock that was meant for the purchase of life insurance. DeLeary did not cash the check, but subsequently asked Richterkessing to provide another check, payable to DeLeary, because the original check was supposedly "stale." DeLeary told Richterkessing he would wire the funds from the second check to John Hancock on her behalf as premium for her life insurance policy.

3. Richterkessing provided a second check for \$5,200 to DeLeary, payable to him.

4. DeLeary cashed the second check from Richterkessing, and diverted the funds for his own personal use.

5. DeLeary sent in Richterkessing's insurance paperwork, but told his broker that Richterkessing's policy was not taken by John Hancock.

6. DeLeary never sent any funds to John Hancock in order to obtain a life insurance policy for Richterkessing, and John Hancock never placed a life insurance policy for Richterkessing because no premium was ever paid.

7. On November 15, 2012, the Division followed up on Richterkessing's complaint by sending a letter of inquiry to DeLeary at his address of record with the Department at that time, 16422 76<sup>th</sup> Avenue, Tinley Park, IL 60477, via first class mail. The letter was not returned as undeliverable.

8. The Division gave DeLeary until December 10, 2012 to respond to its November 15, 2012 inquiry, but DeLeary did not do so.

9. Again on December 12, 2012, the Division sent a letter of inquiry regarding the Richterkessing complaint to DeLeary at his Tinley Park, Illinois, address of record, by both

regular first class mail and certified mail. The certified letter was returned, marked “Return to Sender,” “Unclaimed,” and “Unable to Forward.” The letter sent by regular first class mail was not returned as undeliverable.

10. The Division’s December 12, 2012 letter gave DeLeary until January 2, 2013 to respond, but DeLeary did not do so.

11. On August 5, 2013, in a case captioned *State v. Lee Edward DeLeary*, Case No. 1311-CR02548-01, DeLeary pled guilty in the Circuit Court of St. Charles County to the Class C felony of stealing based on a charge that he did the following:

[I]n violation of Section 570.030, RSMo, [DeLeary] committed the class C felony of stealing by deceit, punishable upon conviction under Sections 558.011 and 560.011, RSMo, in that on or about September 27, 2011, in the County of St. Charles, State of Missouri, the defendant appropriated U.S. currency of a value of at least five hundred dollars which property was in the possession of Caralee Richterkessing, and the defendant appropriated such property from Caralee Richterkessing and with the purpose to deprive her thereof by deceit in that the defendant represented to Caralee Richterkessing that her money was going to be used to pay a premium on a life insurance policy, which representation was false and known by the defendant to be false and Caralee Richterkessing relied on the representation and was thereby induced to part with such property.[<sup>6</sup>]

12. On the charge of felony stealing, the court suspended imposition of DeLeary’s sentence, and ordered him to serve a period of supervised probation for five years, with the requirements that he pay restitution and a restitution fee within two years in equal monthly installments, and that he have no contact with the victim.

### **Conclusions of Law**

We have jurisdiction to hear this complaint.<sup>7</sup> The Director has the burden of proving DeLeary has committed an act for which the law allows discipline.<sup>8</sup> When deciding a motion for

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<sup>6</sup> Petitioner’s Exhibits 2 and 3 to the motion.

<sup>7</sup> Section 621.045.

<sup>8</sup> *Missouri Real Estate Comm’n v. Berger*, 764 S.W.2d 706, 711 (Mo. App., E.D. 1989).

summary decision, we view the facts and the inferences from those facts in the light most favorable to the non-moving party. The burden is on the movant to establish both the absence of a genuine issue of material fact and that he is entitled to a favorable determination as a matter of law.<sup>9</sup>

Because he failed to respond to the complaint or to the Director's discovery, DeLeary has admitted facts and that those facts authorize discipline. But statutes and case law instruct us that we must "separately and independently" determine whether such facts constitute cause for discipline.<sup>10</sup> Therefore, we independently assess whether the facts admitted allow discipline under the law cited.

The Director argues there is cause for discipline under § 375.141.1, which states:

The director may suspend, revoke, refuse to issue or refuse to renew an insurance producer license for any one or more of the following causes:

\* \* \*

(2) Violating any insurance laws, or violating any regulation, subpoena or order of the director or of another insurance commissioner in any other state;

\* \* \*

(4) Improperly withholding, misappropriating or converting any moneys or properties received in the course of doing insurance business;

\* \* \*

(8) Using fraudulent, coercive, or dishonest practices, or demonstrating incompetence, untrustworthiness or financial irresponsibility in the conduct of business in this state or elsewhere[.]

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<sup>9</sup> *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993).

<sup>10</sup> *Kennedy v. Missouri Real Estate Commission*, 762 S.W.2d 454, 456-57 (Mo. App., E.D. 1988).

The Director also relies on 20 CSR 100-4.100(2)(A), *Required Response to Inquiries by the Consumer Affairs Division*, which provides in relevant part:

Upon receipt of any inquiry from the division, every person shall mail to the division an adequate response to the inquiry within twenty (20) days from the date the division mails the inquiry. An envelope's postmark shall determine the date of mailing. When the requested response is not produced by the person within twenty (20) days, this nonproduction shall be deemed a violation of this rule, unless the person can demonstrate that there is reasonable justification for that delay.

We examine in turn the grounds for discipline set out in each count of the complaint, and the facts as established by the record.

Count I – Improperly Withholding, Misappropriating or Converting Monies Received  
In the Course of Doing Insurance Business

The Director argues that DeLeary is subject to discipline because he converted the second \$5,200 check Richterkesing gave him for DeLeary's personal use. We agree.

To withhold is "to refrain from granting, giving or allowing."<sup>11</sup> Misappropriation is "[t]he unauthorized, improper, or unlawful use of funds or other property for [a] purpose other than that for which intended."<sup>12</sup> When DeLeary entered a plea of guilty to felony stealing in St. Louis County, he admitted misappropriating Richterkesing's money, and that he did so with the purpose to deprive her of it. He withheld his client's money when he failed to return it to her, or to use it for the purchase of her insurance policy.

Conversion is the diversion of another's funds, by the holder of such funds, to a purpose other than that specified by the owner.<sup>13</sup> DeLeary obtained a second check for \$5,200 from Richterkesing payable in his own name, under the guise of needing the second check to replace a "stale" one she had previously made payable to the insurance company. Once DeLeary got this

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<sup>11</sup> MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1439 (11<sup>th</sup> ed. 2004).

<sup>12</sup> *Monia v. Melahn*, 876 S.W. 2d 709, 713 (Mo. App. E.D. 1994).

<sup>13</sup> *Hall v. W.L. Brady Investments, Inc.*, 684 S.W. 2d 379, 384 (Mo. App. W.D. 1984).

second check, he cashed it for his own personal use, and never paid the premium for Richterkessing's insurance policy. We find DeLeary's conduct is cause for discipline under § 375.141.1(4).

Count II – Using Fraudulent or Dishonest Practices; Demonstrating Untrustworthiness  
or Financial Irresponsibility in the Conduct of Business

Fraud is an intentional perversion of truth to induce another, in reliance on it, to part with some valuable thing belonging to him.<sup>14</sup> It necessarily includes dishonesty, which is a lack of integrity or a disposition to defraud or deceive.<sup>15</sup> The Director asserts, and we agree, that DeLeary's actions in inducing Richterkessing to write a second check for \$5,200 payable to him, under the false pretense of needing it to replace Richterkessing's "stale check" payable to John Hancock, were fraudulent and dishonest. DeLeary intentionally perverted the truth so he could steal his client's money.

Trustworthy is defined as "worthy of confidence, dependable."<sup>16</sup> Irresponsibility means "lacking a sense of responsibility."<sup>17</sup> Responsibility means "reliability."<sup>18</sup> Without question, DeLeary's deceit and his deliberate mishandling and outright theft of his client's funds are the epitome of irresponsibility and untrustworthiness in the conduct of his business as an insurance producer. He is subject to discipline under § 375.141.1(8).

Count III – Violation of Insurance Laws and Regulations  
by Failing to Respond to Division's Inquiries

The Director seeks a determination that, by failing to respond to either of the Division's inquiry letters, DeLeary violated 20 CSR 100-4.100(2)(A), which requires a response to such letter within twenty days. The evidence shows that DeLeary never responded to either letter sent by the Division, though he is presumed to have received them when they were not returned to the

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<sup>14</sup> *State ex rel. Williams v. Purl*, 128 S.W. 196, 201 (Mo. 1910).

<sup>15</sup> MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 359 (11<sup>th</sup> ed. 2004).

<sup>16</sup> *Id.* at 1344.

<sup>17</sup> *Id.* at 663.

<sup>18</sup> *Id.* at 1062.

Division by the Postal Service.<sup>19</sup> We can infer from his lack of response that he can demonstrate no reasonable justification for his delay. DeLeary's violation of this insurance regulation is cause for discipline under § 375.141.1(2).

### **Summary**

There is cause to discipline DeLeary's insurance producer license under § 375.141.1(2), (4) and (8). We grant the Director's motion for summary decision and cancel the hearing.

SO ORDERED on August 4, 2014.

/s/ Mary E. Nelson  
MARY E. NELSON  
Commissioner

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<sup>19</sup> Under Missouri law, when a letter is duly mailed by first class mail, as here, there is a rebuttable presumption that the letter was delivered to the addressee is the due course of the mails. See *Hughes v. Estes*, 793 S.W. 2d 206, 209 (Mo. App. S.D. 1990).